SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 142

STATE OF LOUISIANA, EX REL. WILLIE FRANCIS,
Petitioner,

vs.

E. L. RESWEBER, SHERIFF OF THE PARISH OF ST. MARTIN, LOUISIANA, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

REPLY AND SUPPLEMENTAL BRIEF FOR PETITIONER

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ARGUMENT

I

The First Eight Amendments of the Constitution of the United States Are Limitations on the Federal Government and Not on the States. However, Some of the Concepts Contained in Those Eight Amendments Are, under Certain Circumstances, Included in the Due Process Clause of the Fourteenth Amendment.

The brief of the respondent lays great stress on the fact that the first eight amendments are restrictions on the Federal Government and reasons therefrom that the double

jeopardy clause of the Fifth Amendment and the cruel and unusual punishment clause of the Eighth Amendment are not included in the Fourteenth Amendment. It is, of course, axiomatic that the first eight amendments do not apply to the states. The question presented in this appeal, however, has no relation to the first eight amendments. This appeal concerns the Fourteenth Amendment and the question to be determined simply is whether the petitioner is being denied a fundamental right which is protected against state infringement by the due process clause of that amendment; and it is submitted that the historic concepts of double jeopardy and cruel and unusual punishment may be used as a guide by this Court in making that determination just as this Court has on previous occasions used other concepts included in the first eight amendments, such as the right to counsel, freedom of speech and of the press, and freedom of religion, in determining what rights are protected by the due process clause.

Respondent will doubtless admit that if the State of Louisiana or any other state attempted to try a defendant or punish a defendant several times for the same offense, such attempt would amount to a denial of due process under the Fourteenth Amendment. Respondent will likewise doubtless admit that if the State of Louisiana, or any other state, attempted to impose some sort of mediaeval torture on a defendant as punishment for an offense, such attempt would amount to a denial of due process under the Fourteenth Amendment. Certainly this Court would not refuse to protect a defendant under such circumstances. It is obvious, therefore, that the question is simply one of degree and each case must be decided on its own particular facts.

II

The Concept of Double Jeopardy Protects a Person from a Second Punishment for the Same Offense as Well as from a Second Trial. In this Case the Sentence of the Court Has Been Partially Carried Out Through the Punishment Already Administered the Petitioner. A Second Attempt at Execution Would Necessarily Repeat That Part of the Punishment Already Administered.

While it has been generally held that double jeopardy means second trial, this Court has held further that the real purpose of the double jeopardy provision is to protect against a second punishment by the same sovereign for the same offense. In *Ex Parte Lange*, 18 Wallace 163, 21 L. Ed. 872, the petitioner had been sentenced, under a statute which provided as a punishment "imprisonment for not more than one year *or* a fine of not less than $10 nor more than $200", to one year in prison *and* a $200 fine. The fine was paid and five days of the year's imprisonment were served before the court realized it had given an improper sentence. Thereupon the petitioner was called back for resentence, the previous sentence was vacated and the petitioner was then sentenced to one year's imprisonment for his offense. On writ of habeas corpus this Court discharged the petitioner on the theory that to enforce the second sentence after petitioner had been punished under the first one would be to subject him to double jeopardy in violation of the Federal Constitution.

On page 168 the Court stated:

> "If there is anything settled in the jurisprudence of England and America it is that no man may be twice lawfully punished for the same offense."

And on page 175:

"The petitioner, then having paid into court the fine imposed upon him of $200, and that money having passed into the treasury of the United States, and beyond the legal control of the court, or of anyone else but the Congress of the United States, and having also undergone five days of the one year's imprisonment, all under a valid judgment, can the court vacate that judgment entirely, and without reference to what has been done under it, impose another punishment on the prisoner on that same verdict? To do so is to punish him twice for the same offense. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing.

"The force of this proposition cannot be better illustrated than by what occurs in the present case if the second judgment is carried into effect. The law authorizes imprisonment not exceeding one year or a fine not exceeding $200. The court, through inadvertence, imposed both punishments, when it could rightfully impose but one. After the fine was paid and passed into the treasury, and the petitioner had suffered five days of his one year's imprisonment, the court changed its judgment by sentencing him to one year's imprisonment from that time. If this latter sentence is enforced it follows that the prisoner in the end pays his $200 fine and is imprisoned one year and five days, being all that the first judgment imposed on him, and five days' imprisonment in addition. And this is done because the first judgment was confessedly in excess of the authority of the court."

* * * * * * *

"We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone; that the principle we have discussed then interposed its shield, and forbade that he should be punished again for that offense. The record of the

Court's proceedings, at the moment the second sentence was rendered, showed that in that very case and for that very offense the prisoner had fully performed, completed and endured one of the alternative punishments which the law prescribed for that very offense, and had suffered five days' imprisonment on account of the other. It thus showed the court that its power to punish for that offense was at an end. Unless the whole doctrine of our system of jurisprudence, both of the Constitution and the common law, for the protection of personal rights in that regard, are a nullity, the authority of the court to punish the prisoner was gone. The power was exhausted; its further exercise was prohibited. It was error, and it was error because the power to render any further judgment did not exist."

* * * * * * *

"There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied."

The *Lange* case is authority for the proposition that no man can be punished twice for the same offense even where the court *through inadvertence* imposed an illegal sentence in the first instance. The fact that the defendant was partially punished under the original illegal sentence acted as a bar against further punishment.

It is submitted that in the case presently before this Court the petitioner has already been partially punished under the sentence of the District Court of the Parish of St. Martin. He has undergone the confinement prior to this execution. He has been prepared mentally and physically for his death. He has been seated in the electric chair and his

body was exposed to the electric current. There was no further punishment which the State of Louisiana could administer to Willie Francis except the actual extinction of his life, and, as already stated, no living being knows how close Francis actually came to death. It cannot be seriously denied that the preparation for execution, with its hopes, its fears and its frustrations, is punishment and this court has so held in *Ex Parte Medley*, 134 U. S. 160, 32 L. Ed. 835.

In order to execute the petitioner, it would be necessary to repeat in full all of the punishment he has already undergone in accordance with the sentence of the District Court—the state certainly cannot pick up where it left off—and to the extent that the punishment must be repeated Willie Francis would be subjected to a second punishment for the same offense. If it be admitted that protection against second punishment is part of the historic concept of double jeopardy, and this Court has foreclosed that issue in *Ex Parte Lange, supra,* and if it be admitted further that the preparation for execution is a part of the punishment under a death sentence, and this Court has foreclosed that issue in *Ex Parte Medley, supra,* then under the circumstances of this case a second attempt to execute the petitioner would be double jeopardy under the English jurisprudence as well as the jurisprudence of this Court.

III

A Second Attempt to Execute Willie Francis Would Be a Denial of Equal Protection of the Law Guaranteed to All Persons by the Fourteenth Amendment of the Constitution of the United States.

The District Court of the Parish of St. Martin sentenced Willie Francis to death in the manner provided by law. That court did not, nor could it, sentence Willie

Francis to be tortured with rehearsal runs, unknown to him as such, in the electric chair. No one will deny that if the court had sentenced Francis to the punishment he has already undergone, in addition to the punishment which the State of Louisiana still wants to inflict on him, that such a sentence would be unconstitutional, not only because it directed the administration of cruel and unusual punishment to which he has not been sentenced, but also because it provided for a denial of equal protection of the law. The possibility that the punishment already administered to Francis may be the result of mere negligence or inadvertence on the part of agents of the state rather than design does not change the basic fact that that punishment, coupled with a second attempt at execution, would be cruel and unusual and a definite departure from any death sentence that has ever been administered by the State of Louisiana upon any of her citizens. Certainly such inadvertence or negligence does not, from the standpoint of Francis personally, make the punishment less severe or more palatable. If he had a right to be executed in the customary manner as persons similarly situated have been and are being executed, then he is not deprived of that right by the mistakes of the State, nor do the mistakes of the State of Louisiana justify a denial of equal protection of the laws to this petitioner.

This Court, in *Barbier* v. *Connolly*, 113 U. S. 227, 113 L. Ed. 923, stated that equal protection of the law under the Fourteenth Amendment means that no greater punishment can be inflicted by a state on one than is inflicted on other defendants similarly situated.

In *Yick Wo* v. *Hopkins*, 118 U. S. 356, it was stated further that acts of state agents under a valid law may nevertheless amount to a denial of equal protection of the law.

It is submitted that if the petitioner is subjected to a second attempt at execution he will be subjected to a pun-

ishment greater than the punishment administered to other condemned men by the State of Louisiana and that he will thereby be denied equal protection of the law.

Conclusion

Assuming that the failure of the first attempt to execute Francis was caused by negligence or inadvertence on the part of the State of Louisiana, any further attempt at execution will be a deliberate, purposeful and intentional act on the part of the State of Louisiana. Such deliberate, purposeful and intential act would amount to double jeopardy and cruel and unusual punishment and a denial of equal protection of the law. It is submitted that those historic concepts of double jeopardy and cruel and unusual punishment as they appear in this case are included in the concept of life and liberty protected by the due process clause of the Fourteenth Amendment of the Constitution of the United States.

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